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Transgender Youth Athletes: Does California Actually Protect Them From Discrimination?

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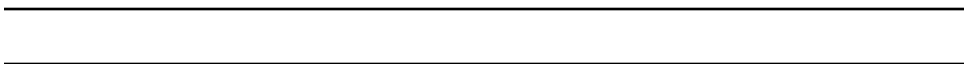
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UNIVERSITY OF THE PACIFIC LAW REVIEW



Transgender Youth Athletes: Does California Actually Protect Them From Discrimination?

Allison Dotta*

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I. INTRODUCTION

Rachael MacKenzie was a teen suffering from anorexia and eventually attempted to take her own life.¹ A lack of self-esteem drove her battle with anorexia.² She began playing sports and found that her mental health grew alongside her physical strength.³ Sports improved her overall well-being, taught her resilience, and helped her make friends.⁴ Rachael overcame these intense struggles as a teen because she found her place in sports.⁵ Sports saved Rachael's life.⁶

Unfortunately, transgender youth often have similar struggles but cannot play sports because of their gender identity.⁷ Forty percent of transgender youth experience depression and one out of five have attempted suicide.⁸ Although transgender youth only account for about two percent of the high school population, they have the highest rate of attempted suicide among youth nationwide.⁹ Transgender youth also have a harder time gaining access to health care—such as therapy—than their cisgender peers.¹⁰

Sadly, many transgender youth athletes must choose between playing sports or being their true selves.¹¹ This lack of participation means these transgender

1. *Sport Saved My Life – and It Can Rescue Your Child's Mental Health*, SKY NEWS (Feb. 14, 2019), <https://news.sky.com/story/sport-saved-my-life-and-it-can-rescue-your-childs-mental-health-11631622> [hereinafter *Sport Saved My Life*] (on file with the *University of the Pacific Law Review*).

2. *Sport Saved My Life*, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Sport Saved My Life*, *supra* note 1.

7. See Mari Haywood, *California Transgender Student Has to Quit Basketball Team, but Keeps Passion for the Sport*, GLAAD (May 9, 2013), <https://www.glaad.org/blog/california-transgender-student-has-quit-basketball-team-keeps-passion-sport> (on file with the *University of the Pacific Law Review*) (describing Tony Bias's story of how bullying and harassment kept him from playing basketball since he came out as transgender); *Research Brief: LGBTQ Youth Sports Participation*, TREVOR PROJECT I (June 23, 2020), <https://www.thetrevorproject.org/wp-content/uploads/2021/08/June-2020-Brief-LGBTQ-Youth-Sports-Participation-Research-Brief.pdf> (on file with the *University of the Pacific Law Review*) (“Sports participation can be one of many areas where LGBTQ youth experience exclusion and discrimination.”).

8. *Mental Health and the LGBTQ Community*, HUM. RTS. CAMPAIGN FOUND. (Oct. 23, 2020), https://suicidepreventionlifeline.org/wp-content/uploads/2017/07/LGBTQ_MentalHealth_OnePager.pdf (on file with the *University of the Pacific Law Review*).

9. Melissa Jenco, *Studies: Suicide Attempts High Among Transgender Teens, Increasing Among Black Teens*, AM. ACAD. OF PEDIATRICS (Oct. 14, 2019), <https://publications.aap.org/aapnews/news/13668>.

10. G. Nicole Rider et al., *Health Care and Utilization of Transgender and Gender Nonconforming Youth: A Population Based Study*, NCBI (Mar. 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5847087/> (on file with the *University of the Pacific Law Review*); *Cisgender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cisgender> (last visited Dec. 22, 2022) (on file with the *University of the Pacific Law Review*) (“[O]f relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth.”).

11. *Research Brief: LGBTQ Youth Sports Participation*, *supra* note 7.

youth cannot benefit from the positive effects of playing sports—such as exercise, friendship, and confidence.¹²

Although California has enacted laws to protect against gender identity discrimination, loopholes in youth sports leave transgender youth unprotected.¹³ The Legislature must remove these shortcomings by revoking tax exemptions for youth sports organizations that discriminate against transgender youth in their activities.¹⁴

Part I of this Comment defines “youth sports organizations” to understand what organizations are at issue.¹⁵ Part II gives an overview of current federal and state laws that prohibit discrimination towards transgender athletes and discusses their weaknesses.¹⁶ Part III offers a legislative solution to close the loophole of transgender discrimination against youth athletes that California laws permit.¹⁷

II. DEFINING YOUTH SPORTS ORGANIZATIONS

Under California law, a youth sports organization is an organization that conducts or sponsors amateur sports clubs, competitions, trainings, or camps.¹⁸ The organization can be a business or a non-profit entity.¹⁹ Further, the law clarifies that to be a youth sports organization, the athletes participating must be seventeen years old or younger.²⁰

The California law that defines youth sports organizations is broad and encompasses many different types of organizations.²¹ A private or public school offering a sports program is a youth sports organization.²² However, schools are not the only youth sports organizations.²³ Non-scholastic organizations for youth sports, such as Little League Baseball, also fall within this definition.²⁴ These

12. *Id.* (“LGBTQ youth who are excluded from sports participation are unable to benefit from its positive effects.”); *see, e.g., Sport Saved My Life, supra* note 1 (detailing the benefits a person struggling with mental health obtained by participating in sports).

13. *See* CAL. EDUC. CODE § 220 (West 2022) (prohibiting gender identity discrimination in activities or programs of education institutions that receive state funding); CAL. CIV. CODE § 51 (West 2022) (giving all people free and equal accommodations, facilities, advantages, privileges, or services in business establishments of every kind).

14. *See infra* Part IV.

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part IV.

18. CAL. HEALTH & SAFETY CODE § 124235(b)(4) (West 2022).

19. *Id.*

20. *Id.*

21. *Id.*

22. *See id.* (“‘Youth sports organization’ means an organization, business, nonprofit entity, or a local governmental agency that sponsors or conducts amateur sports competitions, training, camps, or clubs in which persons 17 years of age or younger participate.”).

23. HEALTH & SAFETY § 124235(b)(4).

24. *See id.*; *Who We Are, LITTLE LEAGUE* (Feb. 20, 2020), <https://www.littleleague.org/who-we-are/> (on file with the *University of the Pacific Law Review*) (describing how the organization operates).

organizations can obtain money to run their program in various ways: membership fees, fundraisers, or school funding.²⁵

III. CURRENT LAWS REGARDING DISCRIMINATION AGAINST TRANSGENDER ATHLETES AND THEIR SHORTCOMINGS

The federal government and California have made significant efforts to protect transgender athletes.²⁶ However, youth sports organizations do not always fall under the laws enacted.²⁷ Therefore, laws do not always protect transgender youth athletes.²⁸

This Comment analyzes the state and federal protections for transgender athletes.²⁹ Section A discusses applicable federal laws and their scope regarding transgender athletes.³⁰ Section B describes California's Non-Discrimination Law and its limitations for protecting transgender athletes in sports activities.³¹ Section C illustrates and analyzes California's Unruh Civil Rights Act ("Unruh Act") and its applicability to transgender youth athletes.³²

A. Brief Overview of Federal Laws and Their Applicability to Transgender Youth Athletes

The federal government has taken many legislative actions to prohibit discrimination in the U.S.³³ The Civil Rights Act of 1964 ("Title VII") and the Higher Education Act of 1972 ("Title IX") prohibit discrimination in the workplace and educational settings.³⁴ Both Title VII and Title IX prohibit discrimination based on "sex."³⁵ Recently, in *Bostock v. Clayton County*, the U.S.

25. HEALTH & SAFETY § 124235(b)(4); *Little League Finances*, LITTLE LEAGUE, <https://www.littleleague.org/university/articles/local-league-finances-what-parents-need-to-know/> (last visited Jan. 24, 2022) (on file with the *University of the Pacific Law Review*) ("[r]egistration fees, fundraisers, and donations are the most common forms of income for a local Little League program").

26. See *infra* Sections II.A–C.

27. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 323, at 4 (Apr. 10, 2013) ("Despite California's non-discrimination policy for state-supported programs and activities, some youth organizations still exclude potential participants and other organizations could do so in the future."); *infra* Sections II.A–C.

28. See *id.* (discussing how California has tried to protect LGBT rights, but there still remains youth organizations that can discriminate).

29. See *infra* Sections II.A–C.

30. See *infra* Section III.A.

31. See *infra* Section III.B.

32. See *infra* Section III.C.

33. See 42 U.S.C. § 2000e-2 (2022) (prohibiting discrimination in the workplace); 20 U.S.C. § 1681 (2020) (prohibiting discrimination based on sex in education institutions receiving federal funding).

34. See 42 U.S.C. § 2000e-2 (describing the prohibited employment practices of discrimination in the workplace); 20 U.S.C. § 1681 (describing prohibition against discrimination on the basis of sex in an educational institution receiving federal funds).

35. See 42 U.S.C. § 2000e-2 (describing the prohibited employment practices of discrimination in the workplace under Title VII, listing "sex"); 20 U.S.C. § 1681 (describing prohibition against discrimination "on the basis of sex" in an educational institution receiving federal funds under Title IX).

Supreme Court interpreted Title VII’s word “sex,” which could subsequently broaden the scope of Title IX’s term “sex.”³⁶

The *Bostock* decision may change Title IX’s scope regarding transgender individuals, as it did with Title VII.³⁷ Subsection 1 reviews Title VII to give context to the scope of Title IX.³⁸ Subsection 2 explains *Bostock v. Clayton County* and its impact on Title VII.³⁹ Subsection 3 discusses Title IX and its current scope to determine whether it prohibits transgender discrimination in youth sports organizations.⁴⁰ Subsection 4 analyzes the implications of Title VII and *Bostock v. Clayton County* on Title IX and transgender athletes.⁴¹

1. Title VII Overview and Interpretation

Title VII focuses on discrimination in the workplace.⁴² Under Title VII, it is unlawful for a business to hire, fire, or discriminate against someone based on race, national origin, color, or sex.⁴³ It is also unlawful for an employer to fail to recommend a qualified individual for a promotion because of that person’s race, national origin, color, or sex.⁴⁴

Prior to *Bostock*, the Circuit courts were split regarding the scope of the word “sex” and whether it included sexual orientation and transgender status.⁴⁵ The Second and Sixth Circuits expanded the scope of the term “sex” under Title VII.⁴⁶ The Second Circuit Court determined that sex encompassed sexual orientation under Title VII.⁴⁷ The court found it impossible for an employer to discriminate against an individual based on their sexual orientation without discriminating against them based on sex.⁴⁸ Therefore, sexual orientation discrimination is a “subset of actions taken on the basis of sex” and violates Title VII.⁴⁹ The Sixth Circuit determined that sex encompassed gender identity, reasoning that an employer could not “discriminate against an employee for being transgender

36. 42 U.S.C. § 2000e-2; *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1747 (2020) (“[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex.”).

37. *Bostock*, 140 S. Ct. at 1731, 1779–80 (Alito, J., dissenting) (describing how the *Bostock* opinion could have potential consequences for sports programs under Title IX) (2020).

38. See *infra* Subsection III.A.1.

39. See *infra* Subsection III.A.2.

40. See *infra* Subsection III.A.3.

41. See *infra* Subsection III.A.4.

42. See 42 U.S.C. § 2000e-2 (outlining unlawful employment practices for an employer having to do with discrimination against a person for certain characteristics).

43. 42 U.S.C. § 2000e-2(a) (2022).

44. 42 U.S.C. § 2000e-2(b) (2022).

45. See *Bostock*, 140 S. Ct. at 1734 (showing the split between the Eleventh Circuit and the Second and Sixth Circuits regarding whether the meaning of “sex” includes sexual orientation and transgender status).

46. See *id.* (describing how the Second and Sixth Circuit Courts decided to recognize sexual orientation and transgender discrimination as a Title VII claim).

47. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d. Cir. 2018).

48. *Id.*

49. *Id.* (quoting *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017)).

without considering the employee's biological sex."⁵⁰ Therefore, discriminating against employees based on their transgender status entails discriminating based on sex in violation of Title VII.⁵¹

Unlike the Second and Sixth Circuit Courts, the Eleventh Circuit narrowly defined "sex" in Title VII.⁵² It determined that "sex" did not encompass sexual orientation under Title VII; therefore, Title VII did not prohibit discrimination based on sexual orientation.⁵³ This decision was consistent with its previous holdings on the issue, so commentators expected the split between the circuit courts.⁵⁴

With circuit courts split on Title VII's scope, there was uncertainty about individuals' civil rights throughout the country.⁵⁵ In June 2020, the U.S. Supreme Court settled the issue in *Bostock v. Clayton County*.⁵⁶

2. Overview of *Bostock v. Clayton County* to Determine the Meaning of Sex

Bostock v. Clayton County combined three cases where, in each case, an employer fired an employee for being transgender or because of the employee's sexual orientation.⁵⁷ Each of the three employees sued their respective employers, alleging sex discrimination in the workplace under Title VII.⁵⁸ While the cases progressed through the courts, the parties had differing interpretations about whether "sex" encompassed sexual orientation or transgender status, and the U.S. Supreme Court combined the cases into one.⁵⁹

In a 6–3 decision, the U.S. Supreme Court held that an employer who fires someone based on their sexual orientation or transgender status violates Title VII.⁶⁰ In reaching this decision, the Court interpreted the conflicting term "sex" in Title VII.⁶¹ It reasoned that discrimination based on transgender status or sexual

50. Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 578–79 (6th Cir. 2018).

51. *Id.* at 578.

52. *Bostock*, 723 F. App'x at 964.

53. *Id.* at 964–65 (11th Cir. 2018).

54. *See id.* ("This circuit has previously held that '[d]ischarge for homosexuality is *not* prohibited by Title VII.' . . . And we recently confirmed that *Blum* remains binding precedent in this circuit . . . In *Evans*, we specifically rejected the argument that Supreme Court precedent . . . supported a cause of action for sexual orientation discrimination under Title VII.").

55. *See Bostock* 140 S. Ct. at 1738 ("[W]e granted certiorari in these matters to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons.").

56. *Id.*

57. *Bostock*, 140 S. Ct. at 1734.

58. *Id.*

59. *See Bostock*, 140 S. Ct. at 1734, 1739 (explaining how one court held that Title VII does not prohibit an employer from firing an employee because they are gay and two other courts allowed the claims to proceed and "sex" is the term in dispute in the case).

60. *Bostock*, 140 S. Ct. at 1734.

61. *Bostock*, 140 S. Ct. at 1739.

orientation “necessarily entails discrimination based on sex.”⁶² Additionally, the Court found it impossible to discriminate against an individual based on their sexual orientation or transgender status without discriminating against them based on sex.⁶³ The Court’s reasoning mirrored the Second and Sixth Circuits’ interpretation of Title VII and resolved the circuit split.⁶⁴

3. Title IX Overview and Application to California’s Youth Sports Organizations

Title VII’s importance for transgender youth athletes ties to the *Bostock* case because it could directly impact other areas besides employment—like Title IX.⁶⁵ Title IX’s purpose is to prohibit educational institutions from discriminating “on the basis of sex.”⁶⁶ An educational institution that receives federal funding cannot exclude a person from participating in any program or activity offered “on the basis of sex.”⁶⁷ However, Title IX is narrow in scope, applying only to admissions to vocational, professional, graduate, and undergraduate educational institutions.⁶⁸ Additionally, if the educational institution is part of a religious organization, it can seek an exemption if the law is inconsistent with its religion.⁶⁹

Currently, Title IX does not encompass gender identity in its protections prohibiting discrimination.⁷⁰ Title IX does not have gender identity enumerated in the law, and most courts are not interpreting “sex” to include gender identity under Title IX.⁷¹ Therefore, schools receiving federal funds can discriminate against

62. *Bostock*, 140 S. Ct. at 1747 (“But as we’ve seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex.”).

63. *Bostock*, 140 S. Ct. at 1741.

64. *Compare Bostock*, 140 S. Ct. at 1741 (“That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”), with *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 578 (6th Cir. 2018) (“[I]t is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex.”), and *Zarda*, at 112 (“[T]hen sexual orientation discrimination is properly understood as a ‘subset of actions taken on the basis of sex.’”).

65. *See supra* Subsections II.A.1–3.

66. 20 U.S.C. § 1681(a) (2022).

67. *Id.*

68. 20 U.S.C. § 1681(a)(1) (2022).

69. 20 U.S.C. § 1681(a)(3) (2022).

70. *See* 20 U.S.C. § 1681(a) (omitting any mention of gender identity in the statute); *see also Bostock*, 140 S. Ct. at 1779 (2020) (Alito, J., dissenting) (describing how gender identity currently is not protected under Title IX).

71. *See* 20 U.S.C. § 1681(a) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”); *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting) (describing how gender identity currently is not interpreted in the phrase “sex” in Title IX).

transgender athletes in their programs.⁷² Transgender youth athletes have no protection in these educational programs.⁷³

4. Title VII and *Bostock*'s Importance to Transgender Athletes

Bostock has the potential to protect transgender individuals under Title IX.⁷⁴ If the *Bostock* reasoning applies to Title IX, educational institutions that receive federal funds could not discriminate against transgender athletes.⁷⁵ Schools receiving federal funds could not deny transgender athletes the ability to play on a team that corresponds with their gender identity.⁷⁶ Currently, Title IX does not include this protection for transgender athletes, but the Court's interpretation in *Bostock* could change Title IX's interpretation to include this protection.⁷⁷ Although there is current litigation surrounding the issue, no court has definitively decided the matter.⁷⁸

However, even if *Bostock* applied to Title IX, transgender discrimination is still a problem for transgender athletes, specifically in youth sports organizations.⁷⁹ The scope of Title IX encompasses only educational institutions that receive federal funding.⁸⁰ Some youth sports organizations operate outside the scope of educational institutions and do not receive federal funding; thus, the law does not cover these organizations.⁸¹ Ultimately, Title IX would protect transgender athletes

72. See *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting) (describing how the Court does not currently interpret gender identity in the phrase "sex" in Title IX, and Title IX does not extend its protection to transgender students).

73. See *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting) (describing how currently Title IX does not extend its protection to transgender students).

74. See 20 U.S.C. § 1681(a) (prohibiting discrimination in educational programs receiving federal funding because of sex); *Bostock*, 140 S. Ct. at 1747 ("But as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex.").

75. See *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting) (explaining that if this opinion's reasoning applied to Title IX, transgender individuals would be able to participate in athletic competitions or on a sports team that relates to their gender identity).

76. See *id.* (Alito, J., dissenting) (explaining that if this opinion's reasoning applied to Title IX, transgender athletes could participate in school sports on a team that relates to their gender identity).

77. See 20 U.S.C. § 1681 (showing a lack of definition for the word "sex"); *Bostock*, 140 S. Ct. at 1778–79 (describing how the Court's decision could have an impact on other issues, such as Title IX and transgender athlete participation).

78. See *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting) ("This issue has already arisen under Title IX"). See generally *Soule v. Conn. Ass'n of Sch., Inc.*, No. 3:20-cv-00201-RNC, 2021 WL 1617206 (D. Conn. filed Feb. 12, 2020), <https://www.aclu.org/cases/soule-et-al-v-ct-association-schools-et-al> (on file at the *University of the Pacific Law Review*) (presenting a complaint for a violation of Title IX with respect to allowing transgender athletes to participate in women's sports at the school).

79. See 20 U.S.C. § 1681(a) (prohibiting discrimination under educational programs receiving federal funding on the basis of sex); *Bostock*, 140 S. Ct. at 1747 ("But as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex.").

80. See 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.").

81. See 20 U.S.C. § 1681(a) (prohibiting discrimination under educational programs receiving federal

in youth sports organizations through educational institutions but not in all youth sports organizations.⁸²

B. California's Non-Discrimination Law and Its Scope Concerning Transgender Athletes

If a school is within the scope of California's Non-Discrimination Law, it cannot discriminate against an individual based on their protected group status in school activities and programs.⁸³ Examples of protected groups include disability, gender identity, gender, gender expression, race, or ethnicity.⁸⁴ The protected groups are not exclusive, and courts can expand the groups to include any trait in the definition of a hate crime.⁸⁵ The law prevents a school from excluding transgender athletes from playing on a team that corresponds with their gender identity.⁸⁶ Transgender students are free to play sports through the school without the worry of rejection.⁸⁷

A school comes under the California Non-Discrimination Law if it receives state funds or enrolls students who receive financial aid from the state.⁸⁸ However, the law does not apply to a religious school if the law's application violates the organization's religious beliefs.⁸⁹ This exemption applies even if the religious school receives state funding.⁹⁰

While California's Non-Discrimination Law makes an effort to prohibit transgender discrimination, it falls short because not all youth sports organizations fall under the law's purview.⁹¹ Some youth sports organizations are out of the law's

funding on the basis of sex); Erin E. Buzuvis, *As Who They Really Are: Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports*, 34 L. & INEQ., 341, 350 (2016) (on file with the *University of the Pacific Law Review*) (describing how non-scholastic youth sports organizations are not associated with schools, but rather national governing bodies ("NGBs")).

82. Compare 20 U.S.C. § 1681(a) (prohibiting discrimination in *educational programs receiving federal funding on the basis of sex*), with Erin E. Buzuvis, *supra* note 81 (describing how non-scholastic youth sports organizations are not associated with schools, but rather NGBs).

83. EDUC. § 220 (explaining the protected groups covered under the law).

84. *Id.*

85. See *id.* ("[D]iscrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes . . . including immigration status.").

86. See *id.* (prohibiting a school receiving state funding to discriminate against a person based on their gender identity in any activity or program conducted by the school).

87. See *id.* (explaining the prohibition against discrimination based on gender identity in any activity or program through a state-funded school).

88. EDUC. § 220.

89. EDUC. CODE § 221 (West 2022).

90. See EDUC. § 220 ("No person shall be subjected to discrimination on the basis of disability, gender, gender identity, . . . in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid."); EDUC. § 221 ("This article shall not apply to an education institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization.").

91. See EDUC. § 220 (prohibiting discrimination for programs and activities through *educational*

scope because they operate independently of educational institutions and do not receive state funding.⁹² Other youth sports organizations are private religious schools and are not subject to the law because of their religious beliefs.⁹³ California's attempt to protect transgender youth athletes falls short with the Non-Discrimination Law because it only protects transgender athletes from discrimination in a public school setting.⁹⁴

If most youth athletes played sports through schools, the law would stop most transgender discrimination in youth sports organizations.⁹⁵ However, current statistics suggest a different pattern for youth participation in sports.⁹⁶ Youth athletes participating in school-sponsored sports are around 800,000, while the estimated total number of youth athletes participating in sports programs is between 2.1 and 2.8 million.⁹⁷ These statistics show that only the 800,000 youth athletes are likely in programs subject to California's Non-Discrimination Law.⁹⁸ However, the statistics do not differentiate between public and private religious school sports programs, which makes a difference because religious schools could be exempt from the law.⁹⁹ The result is that not all of the 800,000 youth athletes are likely in school programs under the law, and the number of youth athletes that the law protects is probably much less than the statistics indicate.¹⁰⁰ Therefore,

institutions receiving funding through the state).

92. *See id.* (prohibiting discrimination in programs and activities through educational institutions that receive states funding); Buzuvis, *supra* note 81 at 50–52 (describing how non-scholastic youth sports organizations are not associated with schools, but rather NGBs).

93. *See* EDUC. § 221 (“This article shall not apply to an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization.”).

94. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 323, at 4 (Apr. 16, 2013) (“Despite California’s non-discrimination policy for state-supported programs and activities, some youth organizations still exclude potential participants and other organizations could do so in the future.”).

95. *Id.* (“Despite California’s non-discrimination policy for state-supported programs and activities, some youth organizations still exclude potential participants and other organizations could do so in the future.”); *supra* Part II.

96. ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, AND INTERNET MEDIA, COMMITTEE ANALYSIS OF AB 379, at 4 (Apr. 23, 2019).

97. *Id.*

98. *See* EDUC. § 220 (prohibiting discrimination for programs and activities through educational institutions receiving funding through the state); ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, AND INTERNET MEDIA, COMMITTEE ANALYSIS OF AB 379, at 4 (Apr. 23, 2019) (describing how in California 808,557 student athletes play sports through their school).

99. *See* EDUC. § 220 (“No person shall be subjected to discrimination on the basis of disability, gender, gender identity, . . . in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid.”); EDUC. § 221 (“This article shall not apply to an education institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization.”); ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, AND INTERNET MEDIA, COMMITTEE ANALYSIS OF AB 379, at 4 (Apr. 23, 2019) (describing the number of youth participating in sports programs in school and out of school generally).

100. ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, AND INTERNET MEDIA, COMMITTEE ANALYSIS OF AB 379, at 4 (Apr. 23, 2019) (describing the how around 808,557 youth athletes play sports in California through schools).

California’s Non-Discrimination Act leaves many youth athletes without protection.¹⁰¹

C. California’s Unruh Civil Rights Act

California’s Unruh Act addresses discrimination against protected groups differently than Title IX and California’s Non-Discrimination Law.¹⁰² It prohibits business establishments from discriminating against protected classes.¹⁰³ The Unruh Act states that everyone is “free and equal” no matter their protected status; therefore, people in California shall have full and equal advantages, privileges, and accommodations in every kind of business establishment.¹⁰⁴ The law lists and defines the protected groups, including a person’s sex.¹⁰⁵ The Unruh Act further defines “sex” as encompassing gender identity.¹⁰⁶

For the Unruh Act to apply, an organization must first qualify as a business establishment.¹⁰⁷ Hotels, restaurants, and hospitals are types of entities that automatically qualify as business establishments under the law.¹⁰⁸ An example of a potential Unruh Act violation is if a restaurant denies a same-sex couple a table when seats are available.¹⁰⁹ If a business establishment violates the Unruh Act, the establishment is liable for the damages, and a jury or court may award any amount.¹¹⁰

There are two areas—critical to transgender youth rights—where courts continue to interpret the Unruh Act: the scope of the term “business

101. *Id.* (describing the difference in numbers between youth athletes playing through schools and through other organizations).

102. Compare 20 U.S.C. 1681(a) (prohibiting discrimination in federally-funded educational programs and activities), and EDUC. § 220 (prohibiting discrimination in state-funded educational activities and programs), with CAL. CIV. CODE § 51 (West 2022) (prohibiting business establishments from discriminating against protected groups of people).

103. See CAL. CIV. CODE § 51(b) (West 2022) (“All persons . . . are free and equal, no matter what their sex, race, color . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”).

104. CIV. § 51(b).

105. CIV. § 51(b) (“All persons within the jurisdiction of this state are free and equal, and no matter what their sex.”).

106. CAL. CIV. CODE § 51(e)(5) (West 2022) (“‘Sex’ also includes, but is not limited to, a person’s gender. ‘Gender’ means sex and includes a person’s gender identity and gender expression.”).

107. *Public Access Discrimination and Civil Rights, Fact Sheet*, DEP’T OF FAIR EMP. AND HOUS., https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/12/DFEH_UnruhFactSheet.pdf (last visited Dec. 22, 2020) (on file with the *University of the Pacific Law Review*).

108. *Public Access Discrimination and Civil Rights, Fact Sheet*, DEP’T OF FAIR EMP. AND HOUS., https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/12/DFEH_UnruhFactSheet.pdf (last visited Dec. 22, 2020) (on file with the *University of the Pacific Law Review*).

109. *Public Access Discrimination and Civil Rights, Fact Sheet*, DEP’T OF FAIR EMP. AND HOUS., https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/12/DFEH_UnruhFactSheet.pdf (last visited Dec. 22, 2020) (on file with the *University of the Pacific Law Review*).

110. CAL. CIV. CODE § 52 (West 2022).

establishments” and intentional discrimination required under the law.¹¹¹ Subsection 1 analyzes whether youth sports organizations fall under the law’s definition of “business establishments.”¹¹² Subsection 2 discusses the Unruh Act’s First Amendment considerations regarding “business establishments.”¹¹³ Subsection 3 explains the Unruh Act’s intentional discrimination requirement to determine whether an organization violates the law.¹¹⁴

1. Determining Whether an Entity is a “Business Establishment” Under the Unruh Act

The Unruh Act states that all people in California are “free and equal,” no matter their protected status.¹¹⁵ Therefore, all people in California qualify for equal services in “business establishments of every kind whatsoever.”¹¹⁶ The Unruh Act prohibits businesses from discriminating against a person based on their race, sex, religion, and—among other things—gender identity.¹¹⁷ The threshold question is whether an entity is a business establishment under the Unruh Act.¹¹⁸

The Unruh Act does not define “business establishment.”¹¹⁹ Instead, courts have determined its meaning through litigation.¹²⁰ The California Supreme Court defines business establishment by its plain meaning.¹²¹ The Court broke down “business establishments” into separate words to explain the terminology.¹²² The Court defined “business” as a “calling, occupation, or trade, engaged in for the purpose of making a livelihood.”¹²³ It defined “establishments” to include not only a fixed, physical location but also a “permanent ‘commercial force or organization’ or a ‘permanent settled position.’”¹²⁴

The California Supreme Court further expanded the meaning of business establishments to include for-profit entities and non-profit entities.¹²⁵ It emphasized that entities serving the economic interests of their members or owners are business establishments.¹²⁶ The court can look to the organization’s business

111. *See infra* Subsections II.C.1–3.
112. *See infra* Subsection III.C.1.
113. *See infra* Subsection III.C.2.
114. *See infra* Subsection III.C.3.
115. Civ. § 51(b).
116. *Id.*
117. Civ. § 51(b), (e)(5).
118. *See* Civ. § 51(b) (omitting any definition of business establishment in the statute).
119. *See id.* (providing no subsection to define “business establishments”).
120. *See* Civ. § 51 (providing no subsection to define “business establishments”); *Burks v. Poppy Constr. Co.*, 370 P.2d 313, 315–16 (Cal. 1962) (defining “business establishments” under the Unruh Act).
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *O’Connor v. Vill. Green Ass’n*, 662 P.2d 427, 430–31 (Cal. 1983).
126. *Curran v. Mount Diablo Council of the Boy Scouts*, 952 P.2d 218, 236 (Cal. 1998).

attributes to determine business establishment status.¹²⁷ These attributes can be employing staff, operating facilities, investing dues, allowing members to bring guests, leasing facilities, or offering goods.¹²⁸

Some youth sports organizations pay their coaches through high membership fees, while other organizations may have volunteers to keep costs down.¹²⁹ Since employing coaches is a business attribute, a court should consider this in its assessment.¹³⁰ Similarly, if a youth sports organization operates facilities—such as a golf course—courts should consider that a business attribute.¹³¹ The court looks at the organization as a whole; therefore, no one business attribute is dispositive.¹³² Therefore, some youth sports organizations may not have business attributes— with volunteer coaches, no facilities, or no other economic purpose.¹³³ Alternatively, other youth sports organizations may have only minor business attributes.¹³⁴ An example is a youth sports organization running a training camp, hiring one leading trainer and having volunteers comprise the staff.¹³⁵ These youth sports organizations could fall outside the scope of the Unruh Act.¹³⁶

However, the court created a rule for when entities with facilities have regular business transactions with non-members serve its members' economic interests.¹³⁷ Therefore, those entities are business establishments subject to the Unruh Act.¹³⁸ Accordingly, youth sports organizations with facilities having regular transactions

127. *O'Connor*, 662 P.2d at 430–31.

128. *See Isbister v. Boys' Club of Santa Cruz, Inc.* 707 P.2d 212, 219 (Cal. 1985) (describing the business attributes of the Boys' Club of employing substantial staff members and operating the facilities); Bradley D. Schwartz, *The Unruh Civil Rights Act: Is a Private Club a Business Establishment After O'Connor v. Village Green Owners Ass'n?*, 21 SAN DIEGO L. REV. 477, 484, 486 (1984) (on file with the *University of the Pacific Law Review*) (discussing the business attributes that can factor into finding an organization to be a business establishment).

129. Ben Baker, *How Should Volunteer Coaches be Evaluated?*, TEAM GENIUS (Jan. 29, 2018), <https://teamgenius.com/should-volunteer-coach-evaluations-be-same-as-paid-coaches/> (on file with the *University of the Pacific Law Review*).

130. *See Isbister*, 707 P.2d at 218 (describing the business attributes of the Boys' Club of employing substantial staff members).

131. *See Warfield v. Peninsula Golf & Country Club*, 869 P.2d 776, 792 (Cal. 1995) (describing how the court took into account a golf country club's business attributes, including its facilities).

132. *See Isbister*, 707 P.2d at 218–19 (describing how different courts looked at different business attributes when analyzing whether an entity was a business establishment).

133. *See, e.g., id.* at 218–19 (Cal. 1985) (describing the business attributes of the Boys' Club of employing substantial staff members and operating the facilities).

134. *Contra id.* at 219 (Cal. 1985) (describing the business attributes of the Boys' Club of employing substantial staff members and operating the facilities).

135. *Contra id.* at 218–19 (Cal. 1985) (describing the Boys' Club activities and business attributes of employing substantial staff members and operating the facilities and thereby determined it was a business establishment).

136. *Contra id.* at 218–19 (Cal. 1985) (describing the Boys' Club activities and business attributes of employing substantial staff members and operating the facilities and thereby determined it was a business establishment); *see supra* Part II.

137. *Warfield*, 869 P.2d at 792.

138. *See, e.g., Curran*, 952 P.2d at 236 (finding that Boy Scouts were not a business organization because the organization was exclusively social and charitable).

with non-members would be business establishments under the law and may not discriminate against transgender athletes.¹³⁹ By adopting this standard, the court devised a more precise rule to clarify a business establishment.¹⁴⁰

Golf country clubs are an example of an entity with facilities that have regular business transactions with non-members.¹⁴¹ When the country club offers golf lessons to the public, hosts events open to the public, or sells food or merchandise to non-members, it has regular business transactions with non-members.¹⁴² Not all country clubs are the same, but if business transactions occur regularly with non-members for facility use, it is enough to fall within the law's scope.¹⁴³ If the golf country clubs offer a youth sports program for children aged seventeen or younger, that youth sports program will fall under the Unruh Act's scope.¹⁴⁴

2. Private Clubs: The First Amendment Considerations and its Relation to the Unruh Act's "Business Establishments"

While California wishes to prohibit entities from discriminating against transgender individuals, it must balance these concerns against its citizens' First Amendment right of freedom of private association.¹⁴⁵ The U.S. Supreme Court has held that individuals and organizations have the right to enter into and have private or intimate relationships.¹⁴⁶ The California courts integrated this First Amendment principle into the Unruh Act by recognizing the importance of private clubs.¹⁴⁷ A private club is not a business establishment under the Unruh Act; private clubs are not under the law's purview.¹⁴⁸ Therefore, a youth sports organization that is a private club is not a business establishment and can lawfully discriminate against transgender athletes.¹⁴⁹

139. See *Warfield*, 869 P.2d at 792 (“[T]he business transactions that are conducted regularly on the club’s premises with persons who are not members of the club are sufficient in themselves to bring the club within the reach of section 51’s broad reference to ‘all business establishments of every kind whatsoever.’”).

140. See *id.* (explaining how the court considers organizations as business establishments if it has regular business transactions with non-members on its premises).

141. See *id.* (describing how golf country clubs receive funds from non-members by permitting the use of their facilities).

142. *Warfield*, 869 P.2d at 792–93.

143. *Id.* at 792.

144. See *id.* (“[T]he business transactions that are conducted regularly on the club’s premises with persons who are not members of the club are sufficient to bring the club within the reach of section 51’s broad reference to ‘all business establishments of every kind whatsoever.’”); see *supra* Part II.

145. Anna Porter, *Antidiscrimination Statutes and Women-Only Spaces in the #MeToo Era*, 2019 U. CHI. LEGAL F. 497, 500–01 (on file with the *University of the Pacific Law Review*).

146. Bd. of Dirs. of Rotary Int’l. v. Rotary Club of Duarte, 481 U.S. 537, 544 (1987).

147. *Warfield*, 869 P.2d at 790.

148. *Curran*, 952 P.2d at 233.

149. See *Curran*, 952 P.2d 236 (“No prior decision has interpreted the ‘business establishments’ language of the Act so expansively as to include the membership decisions of a charitable, expressive, and social organization.”).

Private clubs are entities explicitly for social or charitable reasons.¹⁵⁰ Courts view private clubs as entities that give rise to continuous, personal, and social relationships.¹⁵¹ Courts determine an entity's status as a private club by using a multi-factor test.¹⁵² These factors include selectivity in membership, availability of facilities to non-members, membership control over the organization, size, and the primary purpose of the club.¹⁵³

The first factor courts consider is the selectivity in membership.¹⁵⁴ If an organization restricts membership exclusively on gender identity and nothing else, its selectivity will not be enough to qualify the organization as a private club.¹⁵⁵ The reasoning that supports this conclusion is that the organization would still afford membership to a large portion of the public.¹⁵⁶ On the contrary, selectivity becomes more indicative of a private club when youth sports organizations allow membership on the ability to pay high fees, skill level, and gender identity.¹⁵⁷

The second factor courts consider is the availability of facilities to non-members.¹⁵⁸ If non-members can use the facilities regularly, courts will not view the organization as a private club.¹⁵⁹ California courts have found this factor dispositive in not finding a private club because courts determined this is a type of business establishment activity.¹⁶⁰ Allowing non-members to use the facilities regularly is an economic transaction, and members benefit economically through lower membership fees.¹⁶¹ Because the members benefit from these transactions, the entity has an economic purpose.¹⁶² Entities with an economic or business purpose cannot be private because the purpose of private clubs should be for social or personal relationships.¹⁶³ Therefore, conducting this type of activity takes the entity out of the scope of a private club entirely.¹⁶⁴ The reasoning behind this rule is that the purpose of private clubs should be for social and personal

150. *Id.*

151. *Warfield*, 869 P.2d at 790.

152. *Id.* at 791–92.

153. *Id.*

154. *Id.*

155. *See id.* at 792 (“Although no single factor has been viewed as controlling, many decisions consider the selectivity of lack of selectivity in the admission process to be of prime importance.”).

156. *Curran*, 952 P.2d at 236.

157. *See Warfield*, 869 P.2d at 803 (describing how the high selectivity of the organization was unlike a similar organization that had almost no selectivity and the court labeled it a business establishment instead of a private club).

158. *Id.* at 791–92.

159. *Id.* at 792.

160. *Id.*

161. *See id.* at 793 (discussing how this type of action creates profits to benefit members).

162. *Warfield*, 869 P.2d at 793.

163. *See id.* at 795 (discussing how the First Amendment right to freedom of association applies to highly personal relationships).

164. *See id.* at 792–93 (“[B]ecause of the involvement of defendant's operations in the variety of regular business transactions with nonmembers discussed above, the club properly must be considered a business establishment within the meaning of section 51.”).

relationships.¹⁶⁵ However, not all youth sports organizations have facilities; accordingly, courts would not give this factor any weight in these situations.¹⁶⁶

The third factor the court considers is membership control of the organization.¹⁶⁷ This factor examines whether members have any input on how to run the organization.¹⁶⁸ For example, in youth sports organizations, this factor turns on whether the youth athletes have any control over the team's membership policies.¹⁶⁹ Generally, youth sports organizations fall short because they dictate the membership policies, not the athletes.¹⁷⁰ When an organization—not its members—governs and makes policies, it is less likely to be a private club.¹⁷¹

The organization's size is the fourth factor that the courts consider.¹⁷² The courts evaluate the organization's size because courts view a private club as an organization where members are close-knit.¹⁷³ A small size leads courts to believe the members have personal relationships.¹⁷⁴ However, courts are less willing to believe members are close when the organization is large because it is harder to connect with each member personally.¹⁷⁵ Therefore, large organizations are less indicative of a private club.¹⁷⁶

The size of youth sports organizations differs, especially at local and national levels.¹⁷⁷ Local organization chapters tend to be small, but the organization as a whole can be considerably large.¹⁷⁸ Whether courts find this factor pointing to a private club depends on if they look at the youth sports organization as a whole or locally.¹⁷⁹

165. *See id.* (discussing how this type of action creates profits to benefit members).

166. *Id.* at 791–92.

167. *Warfield*, 869 P.2d at 791–92.

168. *Id.* at 792.

169. *See id.* at 791–92 (“[F]actors that may be relevant . . . (3) degree of membership control over the governance of the organization (and particularly the selection of new members.”).

170. *See id.* at 792 (describing how having members not be involved in the governance and membership decisions is a factor that points to the organization being a business establishment rather than a private club); Buzuvis, *supra* note 81 at 342 (describing how the national governing body of non-scholastic sports govern and create the policies for the organization).

171. *Warfield*, 869 P.2d at 792 (describing how having members not be involved in the governance and membership decisions is a factor that points to the organization being a business establishment rather than a private club).

172. *Id.* at 791–92.

173. *Id.* at 803.

174. *Id.*

175. *Id.*

176. *Warfield*, 869 P.2d at 803–04.

177. *Who is US Youth Soccer?*, US YOUTH SOCCER, <https://www.usyouthsoccer.org/about/who-is-us-youth-soccer/> (last visited Dec. 22, 2020) (on file with the *University of the Pacific Law Review*) (describing membership on a local and national level).

178. *Who is US Youth Soccer?*, US YOUTH SOCCER, <https://www.usyouthsoccer.org/about/who-is-us-youth-soccer/> (last visited Dec. 22, 2020) (on file with the *University of the Pacific Law Review*) (describing membership of their youth sports organization on a local and national level).

179. *See Warfield*, 869 P.2d at 778 (describing how the organization's large total membership was part of why its classification was a business organization rather than a private club).

The last factor courts consider is the purpose of the organization.¹⁸⁰ When the organization's purpose is for its members' economic gain, courts tend not to view the organization as a private club.¹⁸¹ The reasoning behind this position is that courts view private clubs as a place for social relationships.¹⁸² When an organization has members gathered for economic or business reasons, the court views these motivations as defeating private clubs' purpose.¹⁸³

Youth sports organizations' purposes are to play sports, engage in physical activity, and have fun—unrelated to business or economics.¹⁸⁴ Ultimately, the court will factor these purposes in favor of the organization as a private club.¹⁸⁵

Overall, when a court decides whether a youth sports organization is a private club, it looks at all the factors.¹⁸⁶ However, because not all youth sports organizations are the same, the court may deem some—but not all—organizations private clubs.¹⁸⁷ Therefore, some youth sports organizations will not be under the Unruh Act's purview.¹⁸⁸ The Unruh Act's application of these factors reveals its arbitrary nature.¹⁸⁹ The inconsistent result creates uncertainty because it is not readily apparent whether the law exempts a youth sports organization.¹⁹⁰

Recently, the California Court of Appeals dealt with a case concerning whether the Unruh Act could exempt a private religious school.¹⁹¹ In *Doe v. California Lutheran High School Association*, the California Court of Appeal ruled that a private school was not a business establishment under the Unruh Act.¹⁹² The court held that the school is an “expressive social organization whose primary function is the inculcation of values in its youth members.”¹⁹³ Also, the school's religious values established its selectivity, and transactions with non-members were not for the sale of access to the school's facilities or activities.¹⁹⁴ Although this decision applies to only one private school, it could have consequences for other similarly

180. *Id.* at 803.

181. *Id.* at 804.

182. *Id.*

183. *Id.* at 804–05.

184. *Allowing Youth Sports to be Child's Play, Why do Kids Play Sports?*, NATIONWIDE CHILD., <https://www.nationwidechildrens.org/specialties/sports-medicine/sports-medicine-articles/allowing-youth-sports-to-be-childs-play> (last visited Dec. 23, 2020) (on file with the *University of the Pacific Law Review*).

185. *Warfield*, 869 P.2d at 792.

186. *Id.* at 803.

187. *See id.* at 795 (saying how determining a private club entails a careful assessment of the organization at issue).

188. *See id.* at 792 (describing courts have classified similar organizations with variances as to how they operate differently under the law).

189. *See id.* (describing how looking at five different factors can determine whether an organization is a business establishment or private club).

190. Porter, *supra* note 145 at 500 (“This sometimes-fine line the courts have drawn makes it potentially difficult for defendants to know when they might be subject to provinces of the Unruh Act.”).

191. *Doe v. Cal. Lutheran High Sch. Ass'n*, 88 Cal. Rptr. 3d 475, 475 (Cal. Ct. App. 2009).

192. *Id.* at 483–84.

193. *Id.* at 483 (Cal. Ct. App. 2009).

194. *Id.*

situated private schools.¹⁹⁵ The *California Lutheran High School Association* holding provides a framework for other private schools to argue they are not business establishments under the Unruh Act and can discriminate against transgender individuals.¹⁹⁶

Additionally, a California Court of Appeals recently concluded that public school districts are not business establishments under the Unruh Act.¹⁹⁷ The court reasoned the school district's purpose is not to enhance its economic value and that commercial transactions with the public are not integral parts of its operations.¹⁹⁸ The school grounds' facilities are for its students' physical education; the facilities are not the district's "principal activity and reason for existence."¹⁹⁹ Therefore, the Unruh Act does not apply to public schools, and public school sports programs that discriminate against transgender athletes do not violate the Unruh Act.²⁰⁰ However, the court noted that public schools are still subject to California's Non-Discrimination Law.²⁰¹

3. *Unruh Act's Requirement of Intentional Discrimination*

If a court finds that an organization is indeed a business establishment under the Unruh Act, the victim must show intentional discrimination.²⁰² Under the Unruh Act, the victim must produce evidence to infer that an organization intended to discriminate.²⁰³ The law does not require proof the victim belonged to a protected class, only that the business establishment perceived the person as belonging to a protected class.²⁰⁴

The California Supreme Court ruled that neutral policies disparately impacting a protected class are not enough to show intentional discrimination, even if it is probative.²⁰⁵ The Court reasoned that neutral policies and criteria avoid discrimination because businesses do not need to make subjective or individualized determinations.²⁰⁶ When policies require individualized

195. *See id.* at 485 (Cal. Ct. App. 2009) ("We emphasize the narrow scope of our holding. We hold only that the School established, beyond a triable issue of fact, that it is not a business establishment within the meaning of the Unruh Act.").

196. *Cal. Lutheran High Sch. Ass'n*, 88 Cal. Rptr. 3d at 484.

197. *Brennon B. v. Super. Ct.*, 57 Cal. App. 5th 367, 367 (Cal. Ct. App. 2020).

198. *Id.* at 389.

199. *See id.* at 369, 389 ("Public school districts are not business establishments under the Unruh Civil Rights Act.").

200. *Id.* at 367.

201. *Id.* at 373–74; *see supra* Section III.B.

202. *Harris v. Cap. Growth Invest.* XIV, 805 P.2d 873, 875 (Cal. 1991).

203. *Duronslet v. County of Los Angeles*, 266 F. Supp. 3d 1213, 1217 (C.D. Cal. 2017).

204. CAL. CIV. CODE §§ 51(b), (e) (West 2022).

205. *See Harris*, 805 P.2d at 893 ("Although evidence of adverse impact on a particular group of persons may have probative value in public accommodations cases and should therefore be admitted in appropriate cases . . . a plaintiff must nonetheless plead and prove a case of intentional discrimination to recover under the Act.").

206. *Harris*, 805 P.2d at 890 ("And yet, such evaluations, unguided by neutral criteria announced in advance and applied consistently, may serve to disguise and thereby promote the very kinds of invidious

determinations, it more likely ensures the policy would violate the Unruh Act.²⁰⁷ Therefore, courts reason that neutral policies allow business establishments to comply with the Unruh Act and avoid discrimination.²⁰⁸

The problem with this reasoning is that facially neutral policies sometimes do discriminate.²⁰⁹ For example, youth sports organizations often have birth certificate policies.²¹⁰ Birth certificate policies state that the sex on an athlete's birth certificate is how the organization will classify them.²¹¹ This policy can harm transgender individuals because the sex on their birth certificates does not align with their gender identity.²¹² As a result of the misalignment, the organization will place the athlete in the wrong league or team.²¹³ This misplacement would be contrary to who the athlete is, and they may not want to play in that category.²¹⁴ Additionally, the policy could potentially scare off prospective transgender athletes from joining the youth sports organization.²¹⁵ Birth certificate policies have a disparate impact on transgender individuals.²¹⁶

However, birth certificate policies can be facially neutral and have a legitimate business purpose behind the policy.²¹⁷ Therefore, even though the policy has a disparate treatment of transgender individuals, it would not be enough to prove intentional discrimination under the Unruh Act.²¹⁸

The policy can be facially neutral when the league and team sorting process happens through a paper process.²¹⁹ Through a paper process, members submit

discrimination based on race, sex and other personal traits that the Unruh Act prohibits.”).

207. See *Harris*, 805 P.2d at 889 (“And yet, such evaluations, unguided by neutral criteria announced in advance and applied consistently, may serve to disguise and thereby promote the very kinds of invidious discrimination based on race, sex and other personal traits that the Unruh Act prohibits.”).

208. See *Harris*, 805 P.2d at 890 (Cal. 1991) (“Business establishments seeking to comply with antidiscrimination laws are often directed to adopt and apply consistently neutral criteria . . . as a means to avoid invidious discrimination in fact as well as in appearance.”).

209. Buzuvis, *supra* note 81 at 343 (“[B]irth-certificate based policies are painfully exclusionary for transgender youth.”).

210. *Id.*

211. *Id.* at 343–44.

212. *Id.* at 353 (“Birth-certificate based classifications often force transgender individuals to suppress or deny their gender identities and to experience the indignity of having their true selves disregarded. This can cause emotional distress, which, for some, rises to the level of clinical significance in the form of a diagnosis called gender dysphoria.”).

213. *Id.* at 343.

214. Buzuvis, *supra* note 81 at 343.

215. *Id.* at 354 (“In the athletic context, gender-consonant policies promote participation by transgender students who would otherwise be deterred by rules that classify them in a manner at odds with their core identities.”).

216. *Id.* at 353 (“Birth-certificate based classifications often force transgender individuals to suppress or deny their gender identities and to experience the indignity of having their true selves disregarded. This can cause emotional distress, which, for some, rises to the level of clinical significance in the form of a diagnosis called gender dysphoria.”).

217. See *Harris*, 805 P.2d at 890, 893 (Cal. 1991) (“A disparate impact analysis or test does not apply to Unruh Act claims.”).

218. *Id.*

219. See *Harris*, 805 P.2d at 889 (“Business establishments seeking to comply with antidiscrimination

their application and information to the organization, and it places players in leagues based solely on the information provided by the player.²²⁰ Sorting and selecting the teams and leagues in this manner means the organization does not see the person and cannot perceive the person as transgender.²²¹ The organization treats all members the same when registering and sorting the birth certificates.²²²

Birth certificate policies also have a legitimate business purpose.²²³ The Unruh Act allows business establishments to establish reasonable and rationally related policies to the business's facilities and services.²²⁴ The birth certificate policy is rationally related to the business's services because youth sports organizations use birth certificates to verify the date of birth needed for registering and sorting teams.²²⁵

Showing the disparate impact of birth certificate policies alone is not enough to prove intentional discrimination under the law.²²⁶ However, an individual can still show intentional discrimination within the policy if they can prove the organization implemented it specifically to exclude transgender athletes.²²⁷ For example, an organization implements a birth certificate policy to exclude transgender athletes from playing under their gender identity because of the belief that transgender athletes have an unfair competitive advantage.²²⁸ If the victim proves that this reasoning was behind the birth certificate policy, the policy would

laws are often directed to adopt and apply consistently neutral criteria as a means to avoid invidious discrimination in fact as well as in appearance.”).

220. See *Duronslet*, 266 F. Supp. 3d at 1217 (discussing how the facility operators and sports organizations sort people based on information provided to them).

221. Lisa Gennaro, *How to Make an Online Youth Sports Registration Form*, WP FORMS (Dec. 3, 2020), <https://wpforms.com/youth-sports-registration-form/> (on file with the *University of the Pacific Law Review*).

222. Buzuvis, *supra* note 81 at 343.

223. See *Harris*, 805 P.2d at 886 (“Unruh Act issues have often been decided as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public.”); *Reasons You Need to Have Your Child’s Birth Certificate Handy*, DATAFIED, <https://www.datafied.com/reasons-you-need-to-have-your-childs-birth-certificate-handy/> (last visited Dec. 23, 2020) (on file with the *University of the Pacific Law Review*) (“[T]o get into any of these [youth sports leagues] you will need to provide your child’s birth certificate to verify their age.”).

224. *In re Cox*, 474 P.2d 992, 995–96 (Cal. 1970); see *Harris*, 805 P.2d 875 (“[T]he particular business interests of the purveyor in maintaining order, complying with legal requirements, and protecting a business reputation or investment were recognized as sufficient to justify distinctions among its customers.”).

225. *Reasons You Need to Have Your Child’s Birth Certificate Handy*, *supra* note 223.

226. See *Harris*, 805 P.2d at 893 (“A disparate impact analysis or test does not apply to Unruh Act claims.”).

227. *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1228–29 (Cal. 2005) (discussing how a plaintiff can prove intentional discrimination if they can point to any evidence that the organization adopted the facially neutral policy to accomplish discrimination, instead of relying on the effects of a facially neutral policy against a protected group of individuals).

228. Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, SETON HALL J. SPORTS AND ENT. L. 1, 14 (2011) (on file with the *University of the Pacific Law Review*); Gregg Bloche, *Do Transgender Athletes Have an Unfair Advantage?*, HILL (Jan. 20, 2020, 5:00 PM), <https://thehill.com/opinion/civil-rights/479032-do-transgender-athletes-have-an-unfair-advantage> (on file with the *University of the Pacific Law Review*).

show intentional discrimination.²²⁹ Unfortunately, organizations will not usually admit to implementing discriminatory policies.²³⁰ Therefore, proving intentional discrimination can be hard for birth certificate policies, and the result is that birth certificate policies generally do not violate the Unruh Act.²³¹

IV. SOLUTION: REVOKE TAX EXEMPTIONS FOR DISCRIMINATORY ACTIONS

The California Legislature should modify a 2013 bill that revoked tax exemptions when specific organizations discriminate against protected groups.²³² Senate Bill 323 (“SB 323”) encompassed youth sports organizations and other organizations.²³³ Although SB 323 was a step in the right direction to protect transgender individuals, the Legislature never enacted it into law.²³⁴

Even though SB 323 failed, its framework can still protect California’s transgender individuals against discrimination in youth sports organizations.²³⁵ Section A examines SB 323 because it establishes the proposed solution’s framework.²³⁶ Section B discusses the proposed solution—a modification of SB 323—to close the loophole in California that allows transgender discrimination in youth sports organizations.²³⁷

A. An Overview of Senate Bill 323

SB 323 provided that a public charity youth organization discriminating against marginalized individuals will not receive the non-profit tax exemption.²³⁸

229. *Koebke*, 115 P.3d at 1228–29 (discussing how a plaintiff can prove intentional discrimination if they can point to any evidence that the organization adopted the facially neutral policy to accomplish discrimination, instead of relying on the effects of a facially neutral policy against a protected group of individuals).

230. *Section VI: Proving Discrimination – Intentional Discrimination*, U.S. DEP’T JUST. (updated Feb. 3, 2021), <https://www.justice.gov/crt/fcs/T6Manual6> (on file with the *University of the Pacific Law Review*).

231. *Harris*, 805 P.2d at 875 (“[T]he language and the history of the Unruh Act indicate that the legislative object was to prohibit *intentional* discrimination in access to public accommodations . . . although evidence of adverse impact on a particular group of persons may have probative value.”) (emphasis added).

232. *See* SB 323, 2013 Leg., 2013–2014 Reg. Sess. (Cal. 2013) (as amended on Aug. 14, 2013, but not enacted) (“[A]n organization that is a public charity youth organization that discriminates on the basis of gender identity, race, sexual orientation, nationality, religion, or religious affiliation is not exempt from the taxes imposed by that law.”).

233. *See id.* (including organizations such as Boy Scouts, Future Business Leaders of America, and Future Homemakers of America).

234. *See* Complete Bill History of SB 323, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201320140SB323 (last visited Dec. 22, 2020) (on file with the *University of the Pacific Law Review*) (“Died on the inactive file. From Assembly without further action.”).

235. *See* SB 323, 2013 Leg., 2013–2014 Reg. Sess. (Cal. 2013) (as amended on Aug. 14, 2013, but not enacted) (“[A] public charity youth organization that discriminates on the basis of gender identity, race, sexual orientation, . . . shall not be exempt from taxes.”).

236. *See infra* Section IV.A.

237. *See infra* Section IV.B.

238. SB 323, 2013 Leg., 2013–2014 Reg. Sess. (Cal. 2013) (as amended on Aug. 14, 2013, but not

Public charity youth organizations discriminate if they have a formal policy of discrimination or fail to show they have a formal policy that bars discrimination.²³⁹

SB 323 defined “public charity organizations” as organizations with the purpose of competitive youth sports or promoting good citizenship.²⁴⁰ It listed specific organizations as public charity youth organizations, but the list was not exclusive.²⁴¹ These organizations included Little League and Future Farmers of America.²⁴² Its definition included youth sports programs as well as organizations outside the scope of youth sports organizations, such as the Boy Scouts.²⁴³

SB 323’s downfall was the overbreadth of the term “public charity youth organization.”²⁴⁴ The Boy Scouts of America and organizations with religious ties would have been under the law’s purview.²⁴⁵ By targeting the Boys Scouts and other religious organizations, their supporters strongly opposed the bill.²⁴⁶ There was no public outrage about implementing the bill for youth sports organizations; instead, the focus was mainly on the non-sports organizations.²⁴⁷ In the end, SB 323 could not garner enough support to pass the Legislature because of the broad terminology.²⁴⁸

B. Proposed Legislative Solution

California should enact a modified version of SB 323 (“Proposed Solution”) because SB 323 had a broader scope than necessary for addressing transgender

enacted).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. See SB 323, 2013 Leg., 2013–2014 Reg. Sess. (Cal. 2013) (as amended on Aug. 14, 2013, but not enacted) (“The organization’s primary purpose is to provide a supervised program of competitive sports for youth, or to promote good citizenship in youth.”).

244. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 323, at 4 (Apr. 10, 2013) (“This bill is designed to pressure youth groups to recant their values and beliefs . . . In the name of fighting discrimination, this legislation would actually discriminate against organizations that have faith-based convictions.”).

245. See *id.* (“In the name of fighting discrimination, this legislation would actually discriminate against organizations that have faith-based convictions.”).

246. See *Religious Liberties Under Fire in Calif. Senate Bill*, FAITH NEWS NETWORK (May 30, 2013), <https://www.faithnews.cc/?p=14748> (on file with the *University of the Pacific Law Review*) (giving an example of a reaction of those opposed to SB 323); Sara Bitterman, *California Bill Targets Youth Programs for Discrimination*, DAILY UNIVERSE (Mar. 1, 2013), <https://universe.byu.edu/2013/03/01/california-bill-targets-youth-programs-for-discrimination/> (on file with the *University of the Pacific Law Review*) (“[T]here are people who see this bill as an attack on religion by asking these groups to compromise their beliefs to implement the bill.”).

247. See ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 323, at 2 (Aug. 14, 2013) (“Based on the statements provided by both this bill’s author and sponsor, it would appear that this measure is plainly directed at the discriminatory policies and practices of the BSA.”).

248. See Complete Bill History of SB 323, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201320140SB323 (last visited Dec. 22, 2020) (on file with the *University of the Pacific Law Review*) (“Died on the inactive file. From Assembly without further action.”).

discrimination in youth sports organizations.²⁴⁹ The Proposed Solution differs from SB 323 because it changes who the bill would apply to but keeps the critical tax revocation for transgender discrimination.²⁵⁰ Implementing the Proposed Solution would directly address the gaps in the law permitting transgender discrimination.²⁵¹

The Proposed Solution differs from SB 323 because it would apply specifically to “youth sports organizations” instead of “public charity youth organizations,” as stated in SB 323.²⁵² This change is essential for two reasons.²⁵³

First, the change addresses the current shortcomings in the state and federal laws for transgender athletes.²⁵⁴ Currently, private religious schools fall outside of California’s Non-Discrimination Law and Unruh Act’s scope.²⁵⁵ California’s Non-Discrimination Law allows exemptions for religious schools if the application of the law is inconsistent with its religious beliefs.²⁵⁶ Non-scholastic youth sports organizations do not fall under California’s Non-Discrimination Law, and they can vary as to whether they fall under the Unruh Act.²⁵⁷ Non-scholastic sports organizations do not fall under California’s Non-Discrimination Law because they are not educational institutions that receive state funding.²⁵⁸ Additionally, the arbitrary nature of the Unruh Act is such that not all non-scholastic youth sports organizations meet the prerequisites of the law to fall under its scope.²⁵⁹

The Proposed Solution’s terminology would encompass all youth sports organizations, regardless of whether the organization is a business establishment, private club, or educational institution.²⁶⁰ Therefore, the Proposed Solution would have a broader scope than the Unruh Act and California’s Non-Discrimination Law.²⁶¹ The Proposed Solution would help ensure that California can still have the

249. See SB 323, 2013 Leg., 2013–2014 Reg. Sess. (Cal. 2013) (as amended on Aug. 14, 2013, but not enacted) (providing a framework for the revoking a tax exemption for non-profit organizations that discriminate).

250. See *id.* (describing how SB 323 applies to “public charity youth organizations”).

251. See *supra* Part III.

252. See SB 323, 2013 Leg., 2013–2014 Reg. Sess. (Cal. 2013) (as amended on Aug. 14, 2013, but not enacted) (“[P]ublic charity youth organizations.”).

253. See ASSEMBLY COMMITTEE ON REVENUE AND TAXATION, COMMITTEE ANALYSIS OF SB 323, at 4 (Aug. 12, 2013) (describing how there was opposition to SB 323 from religious groups because they believed that SB 323’s private charity youth organizations encompass religious groups and discriminates against them); SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 323, at 4 (Apr. 10, 2013) (describing how any youth group under “public charity youth organization” would be subject to SB 323).

254. See *supra* Part III.

255. See *supra* Sections II.B–C.

256. EDUC. § 221.

257. See *supra* Sections II.B–C.

258. See EDUC. § 220 (prohibiting discrimination for programs and activities through *educational institutions* receiving funding through the state) (emphasis added); *supra* Section III.B.

259. See *supra* Section III.C.

260. See *supra* Part II.

261. Compare *supra* Part III (describing the scope of “youth sports organizations”), with *supra* Section IV.A (describing the scope of “public charity youth organizations”).

power to stop transgender youth discrimination in organizations outside the current laws.²⁶²

Second, the Proposed Solution avoids SB 323's broad language that caused the bill's criticism by changing who the bill applies to.²⁶³ This change is essential because SB 323's criticized terminology led to its failure to become law.²⁶⁴ The Proposed Solution includes only "youth sports organizations," which does not encompass the other organizations that upset the public when SB 323 went through the Legislature.²⁶⁵ Changing who the law applies to, the Proposed Solution adopts non-controversial parts the public and Legislature agreed with, without the controversy over the Boy Scouts and religious groups.²⁶⁶ Although there is still transgender discrimination in these groups, this Comment will not address it.²⁶⁷

The Proposed Solution would also revoke tax exemptions to those youth sports organizations that discriminate against transgender athletes, similar to SB 323.²⁶⁸ California prioritizes the protection of marginalized individuals, and giving tax exemptions to organizations that discriminate against them contradicts California's priorities.²⁶⁹ California should not reward youth sports organizations that discriminate against participants based on their gender identity with state tax exemptions.²⁷⁰

262. See *supra* Sections II.B–C (describing how not all youth sports organizations are under California's laws).

263. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 323, at 4 (Apr. 10, 2013) ("This bill is designed to pressure youth groups to recant their values and beliefs . . . In the name of fighting discrimination, this legislation would actually discriminate against organizations that have faith-based convictions."); Patrick McGreevy, *California Lawmakers Threaten to Strip Scouts of Tax Exemptions*, L.A. TIMES (Apr. 11, 2013), <https://www.latimes.com/local/la-xpm-2013-apr-11-la-me-boy-scouts-20130411-story.html> (on file with the *University of the Pacific Law Review*) ("Under the bill, Scouting groups that raise money through events such as Christmas tree sales would have to pay taxes on the proceeds . . . State Sen. Stephen Knight (R-Palmdale) voted against the bill . . . 'I certainly wouldn't want to do something that would take away Scout troops in communities,' he said. 'Scouting has done a lot for many people, including my boys.'").

264. See McGreevy, *supra* note 263 (describing the large, highly publicized opposition to SB 323 because of its application to the Boy Scouts).

265. See *id.* (describing the opposition to SB 323 because of its application to the Boy Scouts).

266. See Bitterman, *supra* note 246 (describing the religious viewpoint for opposition to SB 323); Cheryl Wetzstein, *California Trying to Strike Out Tax-Exempt Status for Little League, 'Discriminatory' Groups*, WASH. TIMES (Aug. 26, 2013), <https://www.washingtontimes.com/news/2013/aug/26/california-bill-targets-tax-exempt-status-for-disc/> (on file with the *University of the Pacific Law Review*) ("Gay-friendly bills have appeared to be unstoppable in California.").

267. See *Curran*, 952 P.2d at 236 (describing how the Boys Scouts are not a business establishment under the Unruh Act and therefore not under the scope of the law); ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 323, at 1 (Apr. 16, 2013) ("Although California has articulated a non-discrimination policy for state-supported programs and activities, some youth organizations, . . . still exclude potential participants.").

268. See *supra* Section IV.A.

269. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 323, at 4 (Apr. 16, 2013) ("SB 323 makes clear that, in accordance with existing California law prohibiting discrimination in state-supported programs activities, youth organizations that exclude potential participants based on their sexual orientation, gender identity or religious affiliation will no longer be rewarded with state support in the form of these special tax exemptions.").

270. See *supra* Sections II.B–C.

Having a tax exemption is a massive perk for an organization, and taking that perk away in addition to imposing taxes could be detrimental.²⁷¹ Organizations depend on tax exemptions and may be unprepared for the consequences of losing them.²⁷² Implementing the Proposed Solution will incentivize organizations to develop non-discriminatory policies and ensure no discrimination occurs.²⁷³ Private religious schools and non-scholastic youth sports organizations create a loophole in California laws that allow discrimination against transgender youth athletes.²⁷⁴ The Proposed Solution’s tax exemption revocation would affect these organizations precisely because they are non-profits with tax exemptions.²⁷⁵ Therefore, the Proposed Solution would specifically address the loophole for transgender discrimination.²⁷⁶

V. CONCLUSION

California has prioritized preventing transgender discrimination.²⁷⁷ However, existing laws do not adequately protect transgender athletes against discrimination in youth sports.²⁷⁸ Title IX does not currently encompass youth sports organizations.²⁷⁹ California’s Non-Discrimination Law only applies to public schools.²⁸⁰ The Unruh Act applies unevenly to non-scholastic youth sports organizations because of its arbitrary nature, and it does not apply to all private religious schools.²⁸¹ Some youth sports organizations fall under the Unruh Act while others do not, and courts determine this on a case-by-case basis.²⁸² The result leaves many transgender athletes unable to participate in all youth sports organizations.²⁸³

271. See Bitterman, *supra* note 246 (“The tax rate is so high in California that non-profit organizations would find themselves having to pay a substantial portion of their donations to the State of California.”).

272. See *id.* (“[T]aking away the tax exemptions from these youth organizations could be devastating to the organizations financially.”).

273. See ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 323, at 3 (Aug. 21, 2013) (describing the impact of taking away the state tax exemption for the Boy Scouts of America).

274. See *supra* Sections II.B–C.

275. Andra Picincu, *What Is a 501(c)(3) Educational Organization?*, CHRON. (Aug. 10, 2020), <https://smallbusiness.chron.com/501c3-educational-organization-60098.html> (on file with the *University of the Pacific Law Review*); *Youth Sports Organizations*, NON PROFIT ADVISOR GRP. (Feb. 22, 2020), <https://starta501c3.org/project/youth-athletic/> (on file with the *University of the Pacific Law Review*).

276. *Id.*; see *supra* Section IV.A.

277. See *supra* Sections II.B–C.

278. See *supra* Part III.

279. See *supra* Subsection III.A.3.

280. See *supra* Section III.B.

281. See *supra* Section III.C.

282. See *supra* Section III.C.

283. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 323, at 4 (Apr. 10, 2013) (describing how there is still discrimination in youth organizations of LGBT youth, even with the existing California laws in place). See *supra* Sections II.A–C.

Although California has attempted to enact legislation to close the loophole for discriminating against transgender youth athletes, it has failed.²⁸⁴ The Proposed Solution offered in this Comment would close this loophole with a tailored approach.²⁸⁵ It would revoke tax exemptions for youth sports organizations that discriminate against gender identity, amongst other characteristics.²⁸⁶ Given some youth sports organizations' ability to discriminate, the Proposed Solution is imperative.²⁸⁷

284. *See supra* Section IV.A.

285. *See supra* Section IV.B.

286. *See supra* Section IV.B.

287. *See supra* Part IV.

